

Appendix A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17,434

ILLINOIS CENTRAL RAILROAD COMPANY,

Appellant,

versus

LARRY J. ANDRE,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(May 13, 1959.)

Before HUTCHESON, Chief Judge, and RIVES and JONES, Circuit Judges.

JONES, Circuit Judge: The appellee, Larry J. Andre, was at the time of the event here related, and for twelve years had been, a switchman in the employ of the appellant, Illinois Central Railroad Company. On the afternoon of April 8, 1954, he was one of a crew of five engaged in switching tank cars

to industrial sidings in North Baton Rouge, Louisiana. During such a switching movement, the assignment of one of the switchman, sometimes referred to as a pin-puller, is to pull a coupling pin so as to uncouple and permit the separation from the train of the cars which are to be cut out and kicked onto the siding of a shipper for loading. The pin-pulling operation is to be performed while the train is slowly backing, after which the pin-puller is to mount the side of a car. When the train attains a momentum of six to eight miles per hour the engineer, upon a flag-down signal from the engine foreman, should apply the brake so as to stop the engine and the forward section of the train and to cause the uncoupled cars to be cut away and move onto the loading track of the shipper. The appellee was the pin-pulling switchman of the crew at North Baton Rouge. He was working on the fireman's side of the train although it was customary for the pin-puller to work from the engineer's side. There was evidence from which it might have been found that the appellee, in violation of a safety rule of the appellant, did not have firm hand and foot holds during the uncoupling operation. Eleven cars of a thirty-four car string were to be cut loose and kicked onto a loading siding. The appellee had pulled the pin and was in process of securing his hold upon the grab iron on the car when the engineer brought the train to a sudden stop. The jerk of the stop threw the appellee from the train and under it. He was severely injured. After three years of incapacity he sought reemployment from the railroad. It concluded that he was not physically able to resume his duties as a switchman. It did hire him as a fireman. He lost his seniority and the regularity of employment incident to it. Suit was brought by the appellee against the railroad under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq. The appellee

charged that his injuries resulted from the appellant's negligence in bringing the train to a sudden and jerking halt without observing his position and without giving him any warning. The appellant denied negligence. **It claimed, and the engineer testified, that because of chemical fumes from industrial plants in the area the engineer was about to sneeze, and, knowing he would be unable to see the engine foreman's flag-down signal while sneezing, and to be sure he would not run into a string of cars from another track while sneezing, he came to a sudden stop.** The appellant asserted that the appellee was negligent in that he was not in a safe place and position as required by its operating rules, that he should have expected a sudden stop at any time, and that the injury to the appellee resulted solely because of his own negligence. On these issues the case was tried. The court instructed the jury on the question of the care required on the part of the engineer and on the part of the appellee. The court charged that if there was negligence of another employee which caused the accident, but that if the negligence of the appellee contributed to the cause of the accident, his negligence should be considered as grounds for reducing or diminishing any award of damages. No charge was given or requested which related to the effect of sneezing as justifying conduct which might otherwise be negligent. The jury returned a verdict for the appellee in the amount of $91,000. Judgment was entered on the verdict. The appellant filed a motion for a new trial and in the alternative for a remittitur. The court entered an order granting a new trial unless a remittitur of $21,000 be entered. The remittitur was entered and the amount of the judgment is now for $70,000. On appeal it is urged that there was no negligence in the sudden stopping of the train by the engineer in anticipation of an attack of sneezing, that

the appellee was injured through his own negligence and that the verdict was excessive.

The case was submitted to the jury on instructions which amply stated the law as to negligence, contributory negligence and damages. These instructions are not here questioned. **The fact that a sneeze is involuntary, violent and sudden is not decisive of the question. It was the** violent and sudden stopping of the train which was asserted to be negligence of the appellant. The question was for the jury. See *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 524, 559, 77 S. Ct. 443, 459, 478, 1 L. Ed. 2d 493, 515, reh. den. 353 U. S. 943, 77 S. Ct. 808, 1 L. Ed. 2d 764. The question as to the violation of the appellant's safety rule by the appellee was properly in the case. But whether it was a cause of the injury, and if so whether the sole or a contributing cause, and if the latter, the extent of the contribution were properly treated as questions for the jury. *Rocco v. Lehigh Valley Railroad Co.*, 288 U. S. 275, 53 S. Ct. 343, 77 L. Ed. 743; *Chicago & N. W. Ry. Co. v. Garwood*, 8th Cir. 1948, 167 F. 2d 848; *Atchison, T. & S. F. Ry. Co. v. Ballard*, 5th Cir. 1940, 108 F. 2d 768, reh. den. 109 F. 2d 1012, cert. den. 310 U. S. 646, 60 S. Ct. 1096, 84 L. Ed. 1413. If there was negligence on the part of the appellant and that negligence played any part in producing the injury the appellee should recover. *Rogers v. Missouri Pacific Railroad Co., supra.*

We cannot say that th amount awarded to the appellee, as reduced by the remittitur, is excessive. The injuries were, and the appellant so admits, severe and painful. He was completely disabled for nearly three years. He has a partial disability that will be continuing and result in a substantial reduction in his future earnings. We find nothing here that

requires us to set aside the award of damages. *Ohio Casualty Insurance Co. v. Brown*, 5th Cir. 1957, 241 F. 2d 795; *Travelers Insurance Company v. Stanley*, 5th Cir. 1958, 252 F. 2d 115.

The judgment appealed from is

AFFIRMED.

Appendix B

JUDGMENT

Extract from the Minutes of May 13, 1959.

ILLINOIS CENTRAL RAILROAD COMPANY,

No. 17454

versus

LARRY J. ANDRE.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Illinois Central Railroad Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Appendix C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17,454

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

versus

LARRY J. ANDRE,
Appellee.

MOTION FOR STAY OF MANDATE

TO THE HONORABLE THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Defendant-Appellant, Illinois Central Railroad Company, respectfully present, this, their application for, and move the Court, to enter an Order staying the issuance of mandate in this case, under the provisions of Section 2101 (f) Title 28, United States Code, and pursuant to Rule 32 of the Rules of this Court, because it is the bona fide intention of said Appellant to make proper and timely application to the Supreme Court of the United States for a writ of Certiorari.

The grounds upon which said petition for Certiorari will be based are substantially as follows:

That the decision of the Court of Appeals for the Fifth Circuit is in error in holding that the action of the engineer

in making a sudden stop of the slowly moving switch engine and cut of cars, due to a violent, involuntary and sudden fit of sneezing was not decisive on the question of negligence and in not finding and holding that as a question and matter of law as well as in fact, the actions of the engineer in the sudden emergency, being those of a normal, reasonable, prudent and experienced person using his best judgment under the circumstances, was not an act of negligence even though another course of conduct would have been safer or even might have avoided the injuries to Plaintiff-Appellee.

Appellant further shows that it executed as Principal with proper surety and there is of record and in full force and effect in these proceedings, a cost and supersedeas bond in the principal sum of SEVENTY FIVE THOUSAND AND NO/100 ($75,000.00) DOLLARS conditioned on its paying the amount of whatever final judgment herein together with all interests and costs that may be awarded and therefore no further bond or security is required from Appellant pending final decree in these proceedings.

WHEREFORE, Appellant moves the Court for an Order staying the issuance of mandate herein pending the filing by Appellant of a petition for certiorari in the Supreme Court and until final dispositions therein of this case.

In support hereof, Appellant attaches the statement of Counsel.

(s) H. PAYNE BREAZEALE
BREAZEALE, SACHSE, WILSON
& HEBERT
620 Commerce Building
Baton Rouge, Louisiana

Attorney for Defendant-Appellant

I hereby certify that it is the bona fide intention of the Illinois Central Railroad Company, Defendant-Appellant, to make application to the Supreme Court of the United States for a writ of Certiorari within the time provided for by law and that I believe that there is merit in its case and that the judgment of the United States Court of Appeals, Fifth Circuit, ought to be reviewed by the Supreme Court of the United States.

I further certify that a copy of this applicatiton has been mailed, postage prepaid, to Mr. Leon Hebert and Mr. Percy J. Landry, of Hebert and Landry, Attorneys for Plaintiff and Appellee, Larry J. Andre, 118 St. Louis Street, Baton Rouge, Louisiana.

June 1, 1959.

(s) H. PAYNE BREAZEALE
Attorney for Defendant-Appellant

Appendix D

ORDER STAYING MANDATE FILED: JUNE 5, 1959

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17,454

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

versus

LARRY J. ANDRE,
Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States; IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-

mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 5th day of June, 1959.

(s) WARREN L. JONES
United States Circuit Judge.